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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 891

MONITOR PATRIOT CO., NORTH AMERICAN NEWSPAPER ALLIANCE, INC., *Petitioners,*

v.

ROSELLE A. ROY, Executrix of the Will of Alphonse Roy, *Respondent.*

On Writ of Certiorari to the Supreme Court of New Hampshire

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Supreme Court of New Hampshire, reported at 109 N.H. 441, 254 A.2d 832 (1969), was handed down on June 30, 1969 (A. 411-416).

JURISDICTION

By order dated October 15, 1969, Mr. Justice Brennan extended the time in which to file the petition for certiorari to November 27, 1969. The petition for certiorari was timely filed and docketed on November 28, 1969, and was granted on February 24, 1970. Jurisdiction is vested in this Court under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

QUESTION PRESENTED

Whether, in the absence of actual knowledge or reckless disregard of falsity, the publisher of a statement that a candidate for high elective office was a "former smalltime bootlegger" is protected by the Constitution from a libel judgment based on a jury verdict returned under instructions that if the jury found that the statement pertained to the candidate's distant past and thus had no bearing on his present qualifications for office, then the publisher was liable unless he spoke the truth with good faith and for a justifiable purpose.

STATEMENT OF THE CASE

In August 1960, the late political commentator, Drew Pearson, armed with a background report prepared by an assistant, began to investigate an alleged impropriety in the primary campaign of one Herbert Hill for the Democratic nomination for United States Senator from New Hampshire. (A. 146-48.)

Conversations with Joseph Scott, an experienced politician (A. 90) working in Hill's campaign, turned Pearson's interest away from Hill and toward his opponents (A. 90, 152-53).

Pearson learned from Scott that two of the four opponents who had originally filed against Hill had been disqualified as "straw"[1] candidates by the New Hampshire Ballot Law Commission. (A. 152-153, 89.) Scott also told Pearson that the two straws and a third candidate, Frank L. Sullivan, not removed by the Com-

[1] Throughout the testimony, it was generally agreed that a "straw" candidate was one who entered a race with no intention of winning, but rather to draw a block of votes from another candidate in order to permit a third to win by a plurality.

mission, had police records for recurring minor infractions. (A. 156-157, 158-159, 167-168; Pl. Exs. 18, 19; R. V 41, 43.)

Scott further disclosed that Hill's fourth challenger, one-time United States Marshal and plaintiff below, Alphonse Roy,[2] was, as a matter of general knowledge, a former bootlegger. (A. 83, 88-89, 125, 154, 162.) Scott related at least one episode in which he encountered Roy in a speakeasy. (A. 162.) Scott said that Roy had procured the other three Hill opponents as straws and that he suspected that Roy did so in cooperation with the then Senator Styles Bridges, the Republican incumbent. (A. 88-91, 154-55.)

Pearson also talked with Joseph Millimet, Hill's campaign manager, who corroborated much of Scott's information. (R. 162-163.) Particularly, Millimet confirmed the details of the Ballot Law Commission hearings and pointed out that two of the opponents had no campaign organization and that Roy had negligible campaign expenditures and no contributions. (A. 160-161.) Pearson thought that his assistant had also confirmed the bootlegger report. (A. 148-149.)

For further verification, Pearson spoke with the keeper of a correctional farm where Frank Sullivan, one of the primary opponents, had been incarcerated on a drunkenness charge prior to his entry in the primary. (A. 156, 202-203.) Pearson discovered that Roy had called the keeper to inquire when Sullivan would be released. (A. 156, 202-203, 278.) Sullivan's sentence did in fact expire before the July 27 deadline, on which date he filed. (A. 213.)

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[2] Roy died after the trial, his estate was substituted and is respondent here. For simplicity, the "respondent" hereafter refers to Roy.

On the basis of the information he had uncovered, Pearson wrote the article which is the subject of this lawsuit. (A. 176.) The article was scheduled for publication on September 10, three days before the primary and, following its usual procedure, Pearson's office sent it to his distributor three days before the publication date. (A. 176-177, 182.) The article, reproduced in full in the appendix hereto (A. 395-398), read in relevant part as follows (A. 396-398):

Political Snafu

Rock-Ribbed Republican New Hampshire, whose ex-Gov. Sherman Adams was top kick in the White House for years and whose Sen. Styles Bridges is still top kick on the GOP side of the Senate, is so fouled up in a primary snafu that the state may go Democratic this year. The primary verdict is due next Tuesday.

Even that able Senate stalwart, Styles Bridges, is restirring [sic] himself. He has nothing to worry about from his Republican opponent, but the Democrats have put up a dynamic Dartmouth professor, Herbert Hill, against him. The professor came within 11,000 votes of defeating Sherman Adams, lately of vicuna-coat fame, in the 1948 gubernatorial race.

Curiously, the Democratic primary has been cluttered with a motley assortment of candidates who have challenged Hill for the privilege of running against Bridges. That sly, old Republican disclaims any connection with it, but he appears pleased over the muddying of Democratic waters.

One of Hill's primary opponents Frank L. Sullivan, was released from the Grasmere County Work Farm just in time to file for the Senate. With a police record of no fewer than 19 convictions for drunkenness since 1945, he was serving his latest 90-day sentence.

Curious Call

To make sure he would get out in time to run for the Senate, a former small-time bootlegger and later U.S. Marshal, Alphonse Roy, telephoned the Grasmere warden about Sullivan.

Ralph LaVallee in charge of Grasmere, admitted to this column that he had received a telephone inquiry from Roy as to whether Sullivan would be released in time to file. But the warden denied another report that Roy had announced he was calling "on behalf of my friend Styles."

"I don't want to get implicated in anything like that," said La Vallee. "Roy didn't mention Senator Bridges."

Sullivan happily got out of the workhouse in time to run for the most distinguished legislative body in the world. And who should turn up on the ballot but the same Alphonse Roy who was so eager to get him out of the clink.

Because of the peculiar population division of New Hampshire, the Irish Catholics may be inclined to vote for a Frank Sullivan while the French Canadians could be attracted by a name like Alponse Roy. The effect would be to cut down Herb Hill's chances.

Convicts For Senator

Two other curious candidates, who tried to run in the Democratic primary against Hill, were Harold P. McCarthy who has a record of nine convictions for drunkenness, assault, and brawling, and Clement P. Robinson, Jr., who has a record of six brushes with the law for drunkenness and traffic violations. Robinson also received a 30-day suspended sentence for stealing two power lawnmowers and a conviction for the nonsupport of his wife and three children.

> But at least Professor Hill managed to persuade the New Hampshire Ballot Law Commission into knocking McCarthy and Robinson off the ballot.
>
> The bitterest primary battle, however, is between the two Republican gubernatorial candidates, Gov. Wesley Powell and ex-Gov. Hugh Gregg. Powell not only incurred the ire of Vice President Nixon last winter by riding in front of Nixon in the GOP parade through Manchester, but is also antagonizing staunch Republicans by throwing longtime GOP stalwarts out of state jobs in an attempt to build up a personal Powell machine.
>
> Bernard L. Boutin, ex-Mayor of Laconia who is running for governor on the Democratic ticket, may emerge as the final victor after the smoke has settled.

Pearson's distributor, corporate predecessor to petitioner North American Newspaper Alliance (hereafter "NANA"), forwarded the column to subscribing newspapers around the country. (A. 172, 181-182.) No evidence was adduced at trial to show what independent verification NANA undertook or what knowledge it had or could have obtained concerning the statements in the article. The agreement between NANA and Pearson allowed it to propose revisions but Pearson had the final word on content. (A. 173, 289-290.)

One of the subscribers to Pearson's column was the petitioner Monitor-Patriot Co., which publishes a daily newspaper, "The Monitor Patriot", for principal circulation in Concord, New Hampshire. (A. 9, 293.) The Monitor usually received the Pearson column a day before publication (A. 13) and it considered itself free to make only stylistic changes (A. 38-39). The disputed column was reviewed by Enoch Shenton, then City Editor of the Monitor. Shenton testified that, except for the Pearson call to the correctional farm, he was personally aware of all the facts, including the

bootlegger representation, set forth in the article. (A. 295-306.) For this reason (A. 303, 306), and because the Monitor had found Pearson accurate in the past (A. 16), and because it was a small paper (A. 12, 293) with divergent news sources (A. 15) and without an historical index file (a "morgue") (A. 32), the Monitor did not launch a separate investigation for accuracy. (A. 15, 39, 303, 306.)

Forty-seven copies of the Monitor-Patriot were delivered for circulation on the date of publication to Roy's home town of Manchester. (A. 294.) He was apprised of the article after the primary election. (A. 259.)

On November 2, 1960, Roy brought this libel action in the Superior Court of New Hampshire against the Monitor-Patriot and NANA alleging three defamations: (1) that Roy was a "former small-time bootlegger"; (2) that Roy procured straw candidates for the primary; and (3) that Roy was covertly and unethically assisting then Senator Bridges in procuring the straws. (A. 1-5.) Trial was held before a jury in December of 1966. (A.1.) Since the trial ultimately narrowed to a disposition of the bootlegger count,[3] the discussion here is limited to that issue.

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[3] The trial court granted NANA's motion to dismiss on all but the bootlegger count, on the ground that there was no showing that NANA was guilty of "malice", as defined in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). (R. VIII 220, 255; A. 369.) Since, as explained *infra*, the court held that the jury could find the bootlegger count outside the ambit of the *New York Times* rule, that count as against NANA was submitted to the jury. (A. 369.) Although all three counts against Monitor were submitted to the jury over defense objections (R. X 55-56, 58, 99, 118-120), the jury by special verdict stated that its entire award against Monitor was on the bootlegger count (A. 394, 410). Accordingly, the New Hampshire Supreme Court's resolution of the case was limited to the bootlegger count. (A. 411-416.)

At the trial, Scott, upon whom Pearson principally relied for the allegedly libelous bootlegger statement, recounted in detail several incidents from which he learned Roy had been a bootlegger. (A. 92-114.) He said that he and Roy were "married into the same family group" (A. 93, 102) and that, in two private conversations Roy had confided in him about his bootlegging activity (A. 92-96). Two former liquor control agents also testified that they had heard talk that Roy was a bootlegger. (A. 206, 309-310.) In addition, the former City Auditor of Manchester testified that prominent officials in City Hall had referred to Roy as a former bootlegger. (A. 307-308, 314-315.) A former opponent of Roy in a 1956 local campaign testified that stories circulated during the campaign concerning Roy having been a bootlegger. (A. 314.) Finally, Enoch Shenton, the Monitor editor who reviewed Pearson's column, recalled receiving frequent reports, as a young reporter covering the State House in the early 1930's that Roy, then holding a State House post, had been a bootlegger. (A. 295-296, 299.)

Roy repeatedly denied at trial that he ever engaged in illicit liquor traffic (*e.g.* A. 257, 314-319) or that reports to that effect ever came to his attention[4] (A. 279). Witnesses for the plaintiff, including Prohibition enforcement agents, disclaimed knowledge of any bootlegging activity by Roy and of rumors to that effect. (A. 207-208, 223-224, 231-232.)

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[4] It was established that Roy's brothers were bootleggers, a fact Roy admitted (A. 280), and that Roy was present during a raid of a speakeasy in 1923 in which one brother was arrested and fined for selling intoxicants. (A. 126-128.) Roy was taken to the stationhouse because as one officer testified, he was "interfering with an officer." (A. 127.) Roy claimed he went at the request of the authorities to dissuade his brother from further dealing in liquor. (A. 280-283.)

The trial court instructed the jury at length. (A. 366-394.) The bifurcated charge distinguished between a "public libel" and a "private libel" with respect to the bootlegger count (A. 370):

> Is it more probable than otherwise that the publication that the plaintiff was a former smalltime bootlegger was a public affair on a par with official conduct of public officials?
>
> As a candidate for the United States Senate, the plaintiff was within the public official concept, and a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office. That is, anything which might touch on Alphonse Roy's fitness for the office of United States Senator would come within the concept of official conduct. If it would not touch upon or be relevant to his fitness for the office for which he was a candidate but was rather a bringing forward of the plaintiff's long forgotten misconduct in which the public had no interest, then it would be a private matter in the private sector.

If the jury found the bootlegger reference to be in the "public sector", the Court, consistent with its prior ruling that NANA had no "malice"[5] instructed the jury to discharge NANA of liability.[6] (A. 373-374.) As for Monitor, the Court instructed that if the jury found the bootlegger count in the public sector, Monitor, to be liable, must have known that the statement

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[5] See note 3, *supra*.

[6] Since under this charge, the jury returned a verdict against NANA (A. 394), it necessarily found the bootlegger count to be in the private sector. See note 3, *supra*.

was false, or must have published it with a reckless disregard for whether it was true or false. (A. 375.)[7]

The Court then proceeded to instruct the jury upon the resolution of the case if it found the statement to be in the "private sector", as follows (A. 375-376):

> [I]f you have decided that it is a private defamation, the plaintiff would be entitled to recover, that is, you would bring in a verdict for the plaintiff in regard to the private defamation unless . . . it is more probable than otherwise that the publication of the defamatory matter was justified or that it was conditionally privileged.
>
> Now, justification is established—and the defendants have the burden of proof, if you are in the private sector, on justification—is established if the facts stated are true and are published with a justifiable motive. That is, there are two issues there: First, whether the published matter is true, and, secondly, whether it is published from a justifiable motive, that is, to give to persons entitled to know the information so that they can act upon it.
>
> * * *

(A. 376-377):

> * * *
>
> When is a conditional privilege established? Well, it is established if the facts, although untrue, were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief founded on reasonable grounds of the truth of the matter published.

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[7] The Court defined "reckless disregard" as follows (A. 377):

"Reckless in the sense—I would suppose it could be said to be a wanton act, if that would help you, or it could be a state of mind accompanying an act where the actor either paid no regard to its probable harm or injurious consequences or, though foreseeing such consequences, persisted in spite of this knowledge."

(A. 384):

> Of course, with reference to justification, I said there must be a lawful occasion for making the publication. If the end to be attained by the publication is justifiable, that is, to give useful information to those who have a right and ought to know in order that they may act upon such information, the occasion is lawful. Where, however, there is merely the color of a lawful occasion and the defendant, instead of acting in good faith, assumes to act for some justifiable end merely as a pretense to publish and circulate defamatory matter, or for other unlawful purpose, he is liable in the same manner as if such pretence had not been resorted to.

Although these instructions are not distinguished by their clarity, the Court seems to have created two categories of defense in a private libel—truth with justification or conditional privilege. But the constant interchanging of words like "justifiable" scrambles the two categories and the defense of truth, if any, appears to be lost in the confusion.[8]

On petitioners' appeal from the adverse jury verdicts of $10,000 against each petitioner (A. 394), the New Hampshire Supreme Court affirmed by holding in relevant part (A. 414, 415):

> We are of the opinion that the constitutional protections of *New York Times* v. *Sullivan* and later cases do not extend to all statements about public officials or candidates for office, but only to those which relate to their official conduct or fitness for office, and that there may be purely private libels against such persons which will be governed by state law, unrestricted by the Federal Constitution.
>
> * * *

[8] This matter, however, is immaterial to the position we take in this case.

Although engaging in criminal activity even such as small-time bootlegging might be difficult to exclude from those things which affect fitness for office if it were alleged to have occurred recently its inclusion as a matter of law becomes less clear with the passage of a long period of time.

We are of the opinion that small-time bootlegging activity which occurred some 26 or 27 years in the past could be found to have lost its relevancy to prove the present fitness or unfitness of a candidate. The Trial Judge must have made this preliminary determination when he decided to submit the issue to the jury, and the jury must have so found when they determine [sic] the defamation to have been a private one.

That is the decision petitioners seek to review here.

SUMMARY OF ARGUMENT

I

The decision is *New York Times Co.* v. *Sullivan* and related cases clearly prohibit a candidate for public office from recovering damages for a defamatory falsehood relating to his fitness for office unless he proves the statement was made with actual malice, i.e., with knowledge that it was false or with reckless disregard of whether it was false or not. The question in this case is whether a jury is permitted to find a libelous statement relating to a candidate to be "irrelevant" to his fitness for office, and thus a "private libel" not constitutionally protected by the actual malice rule.

II

Discussion of a candidate's reputation and fitness for office is at the heart of constitutional free speech. A statement that defames a candidate's reputation is

by its very nature of the highest public concern and consequently cannot be excluded from protected free speech. Uninhibited discussion of a candidate's qualifications is indispensable to informed self-government, a primary object of the First Amendment. Moreover, to restrict discussion in a political campaign to an indefinable concept of "relevant" criticism would result in an insidious self-censorship. Those who would speak out in a campaign would steer far wider of the unlawful zone to avoid the risk that their criticism might later be adjudged "irrelevant". This Court, in defining the line between free and actionable speech, should hold that relevancy is a matter for the electorate and not a basis for curbing public discussion of a candidate's fitness for office.

III

Assuming *arguendo,* that the Constitution protects only "relevant" criticism of a candidate's fitness, a charge of prior illegal conduct is relevant as a matter of law.

IV

To obviate a retrial of this case, it is demonstrated that neither respondent published with actual malice. There was no evidence that NANA acted with actual malice and petitioner Monitor, the proof shows, published in reliance both upon Pearson and upon the personal knowledge of the truth of the statement possessed by its reviewing editor. Nor can the alleged malice of Pearson be "imputed" to either petitioner since that would impose an onerous burden of verification upon the press and, moreover, because the evidence also shows Pearson published without actual malice.

ARGUMENT

I. Introductory

This case presents the question of whether the First Amendment protects from libel judgments all criticism and comment respecting a candidate's fitness for public office or only that criticism and comment which a judge or jury finds to be "relevant" to his qualifications.

In the seminal decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this Court enunciated the constitutional rule (*supra*, at 279-280) "that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The underlying precepts of the *Times* rule as well as its application to new areas [9] establish conclu-

[9] The *Times* doctrine has been extended in principal decisions by this Court to criminal libel statutes punishing criticism of public officials (*Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Henry* v. *Collins*, 380 U.S. (1969)), to invasion of privacy judgments which restrict the reporting of "matters of public interest" (*Time, Inc.* v. *Hill*, 385 U.S. 374 (1967)), to libel judgments which deter criticism of "public figures" (*Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967)), and to the dismissal of a teacher who undisruptively criticizes his school board (*Pickering* v. *Board of Education*, 391 U.S. 563 (1968)). Although the opinion by Mr. Justice Harlan in the *Curtis* case would relax the constitutional standard of liability with respect to public figures, five Justices either concurring or dissenting in that case voted for the actual malice test as a minimum standard. The above cases and others (*Rosenblatt* v. *Baer*, 393 U.S. 75 (1966); *Beckley Newspapers* v. *Hanks*, 389 U.S. 81 (1967); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968)) have also refined the malice standard by the application to concrete factual patterns.

sively, as the lower courts held here, that the malice standard applies to candidates for public office.[10] The New Hampshire courts, however, decided that the protection of the malice standard, as applied to candidates or public officials, is forfeited if a jury finds a libelous statement irrelevant to fitness for office and, thus, a private libel governed by state law. Whether the scope of the First Amendment, as construed in *Times* and succeeding cases, can be so restricted presents the central issue here.

II. A Libel of a Candidate Is, as a Matter of Constitutional Law, Relevant to His Qualifications

A statement that defames a candidate for office is always in the mainstream of public affairs.

First, the *sine qua non* of effective government by the people is the informed exercise of the franchise. This is the very undercurrent of the *Times* opinion, for the ultimate value of the speech protected there is to augment the recourse vested in the people to replace those entrusted with the power to govern. In *Times*, the Court cites the following cogent argument of Madi-

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[10] *Accord*, *Goldwater* v. *Ginzburg*, 414 F.2d 324 (2d Cir. 1969) *cert. denied* 38 U.S.L.W. 3279 (Jan. 26, 1970); *Pauling* v. *News Syndicate Co.*, 335 F.2d 659, 671 (2d. Cir. 1964) (*dictum*), *cert. denied* 379 U.S. 968 (1965); *Kapellas* v. *Kofman*, 1 Cal. 3d 20, 36-38, 459 P.2d 912, 916 (Sup. Ct. 1969); *Phifer* v. *Foe*, 443 P.2d 870 (Wyo. Sup. Ct. 1968); *Dyer* v. *Davis*, 189 So. 2d 678 (La. Ct. App. 1966); *McFadden* v. *Detroit Bar Assoc.*, 4 Mich. App. 554, 145 N.W. 2d 285 (1966) (candidate for appointive office); *Gilberg* v. *Goffi*, 21 App. Div. 2d 517, 251 N.Y.S. 2d 823 (1964) *aff'd*, 15 N.Y. 2d 1023, 260 N.Y.S. 2d 29 (1965); *see Thompson* v. *Evening Star Newspaper Co.*, 394 F.2d 774 (D.C. Cir. 1968), *cert. denied* 393 U.S. 884 (1968) (proponent of delegation to political convention).

son assailing the Alien and Sedition Act (376 U.S. at 275, n.15):

> Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively. [4 Elliot's Debates on the Federal Constitution, 575 (1876).]

The Court also cited with approval (376 U.S., at 281) the language of the Kansas Supreme Court in *Coleman* v. *MacLennan*, 78 Kan. 711, 724, 98 P. 281, 286 (1908), which involved the denunciation of a candidate:

> It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged.

See Garrison v. *Louisiana, supra* at 76-77. In short, a paramount interest in *Times* is " 'assur[ing] unfettered interchange of ideas for the bringing about of political and social changes desired by the people' *Roth* v. *United States*, 354 U.S. 476, 484 [(1957)]" (376 U.S.,

at 269), which finds its most genuine expression in the vote.

The law of defamation is more accurately defined by what it seeks to protect rather than by what it is. "The law of defamation protects the interest in reputation—the interest in acquiring, retaining and enjoying a reputation as good as one's character and conduct warrant . . . . The test is whether the alleged defamatory matter has a tendency to harm the reputation or to deter such people from association with the person complaining that he has been defamed." 1 Harper & James, Torts § 5.1, pp. 349-350 (1956). A political campaign is frequently more a contest between reputations and personalities than a dialogue on issues. A successful effort is marked with the same results ascribed to a defamation—"to deter such people [the electorate] from association with [voting for] the person complaining that he has been defamed". One commentator astutely described this peculiarly American competition as follows (Noel, *Defamation of Public Officers and Candidates*, 49 *Colum. L. Rev.* 875 (1949)):

> Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent. If actionable defamation is possible in this field, one might suppose that the chief energies of the courts, for some time after every political campaign, would be absorbed by libel and slander suits. Moreover, the definition of a defamatory communication as one which "holds a person up to hatred, contempt, or ridicule" would not remove the impression that a flood of litigation would be in order.

Accusations that a candidate is or was, even long ago, a deviant, a drunkard, a racketeer, or a bootlegger

are categorically relevant to fitness for office. This Court has extended protection not only to gentle speech, soft epithets and constructive criticism. It rested its view on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials". *New York Times Co.* v. *Sullivan, supra* at 270; *Garrison* v. *Louisiana, supra* at 75; *Rosenblatt* v. *Baer, supra* at 85. "For free speech concerning public affairs is more than self-expression; it is the essence of self-government". *Garrison* v. *Louisiana, supra* at 74-75.

The public interest is illustrated vividly in this case where the bootlegger statement was widely discussed at the polls on primary day (A. 196-197, 229) and in a prior campaign involving the respondent (A. 314). The interest of the voters in this primary was not atypical, but rather represented a healthy and insatiable zest for information about their potential leaders. As the Second Circuit observed in a libel action brought by a noted politician (*Goldwater* v. *Ginzburg, supra* at 335):

> By seeking election to the office of President of the United States, Senator Goldwater invited the press and the public to scrutinize every aspect of his life, public and private alike. His mental and physical health were proper targets for investigation and for adverse comment. We live in an age of powerful nuclear, chemical and biological weapons capable of massive destruction. These weapons are under the ultimate control of the President, and knowledge of the mental stability of the men who seek to be President is not only relevant but indeed crucial if the electorate is to choose intelligently the man to occupy our most powerful office.

To expose antagonists in an election campaign to a libel judgment for statements which a judge or jury later find unrelated to fitness would gravely dilute the right of free speech. In adhering to the actual malice formulation in variant situations, this Court has consistently stressed that the primacy of free speech requires a defense on the periphery to secure the core. Hence, the *Times* opinion recognized that (376 U.S., at 271-272) "erroneous statement is inevitable in free debate and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive', *NAACP* v. *Button*, 371 U.S. 415, 433 [(1963)]". *See Garrison* v. *Louisiana, supra* at 73-75; *Time, Inc.* v. *Hill supra* at 388-389; *St. Amant* v. *Thompson, supra* at 731-732. The Court has implemented Madison's view [11] that "some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press". *New York Times Co.* v. *Sullivan, supra* at 271. For this reason the Court in *Times* concluded that the defense of truth alone is inadequate to prevent an inimical self-censorship by the press (376 U.S., at 279):

> Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser* v. *Randall*, [357 U.S. 513, 526 (1958)]. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendment.

There can be no litmus test for those on the hustings to calculate in the midst of a campaign the relevancy

[11] 4 Elliot's Debates on the Federal Constitution 571 (1876).

of contemplated criticism. And, if the statement is "irrelevant", even total truth is no guarantee of immunity under a non-constitutional rule, for a libel in the private sector may have to be made with "justification" or "good motives" or some other state law test. Such intolerable uncertainty would assuredly produce the very self-censorship which this Court eliminated in *New York Times* with respect to public officials.[12]

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[12] This was a major consideration for the Court concluding in *Farmers Educ. & Coop. Union* v. *WDAY*, 360 U.S. 525, 531 (1959) that Section 315 of the Communications Act of 1934 (48 Stat. 1088, as amended, 47 U.S.C. § 315(a)) proscribes defamation suits against a radio station broadcasting a candidate's campaign oratory:

> The decision a broadcasting station would have to make in censoring libelous discussion by a candidate is far from easy. Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, involving as it does, consideration of various legal defenses such as "truth" and the privileges of fair comment. Such issues have always troubled courts. Yet, under petitioner's view of the statute they would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision. Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution. Moreover, if any censorship were permissible, a station so inclined could intentionally inhibit a candidate's legitimate presentation under the guise of lawful censorship of libelous matter. Because of the time limitation inherent in a political campaign, erroneous decisions by a station could not be corrected by the courts promptly enough to permit the candidate to bring improperly excluded matter before the public. It follows from all this that allowing censorship, even of the attenuated type advocated here, would almost inevitably force a candidate to avoid controversial issues during political debates over radio and television and hence restrict the coverage of consideration relevant to intelligent political decision.

It would cause those who would otherwise speak out to "steer far wider of the unlawful zone" (*New York Times Co.* v. *Sullivan, supra* at 279; *Time Inc.* v. *Hill, supra* at 389) at a time when uninhibited speech is most critically needed. *See Mills* v. *Alabama,* 384 U.S. 214 (1966). Madison's apt description of free speech as the "only effectual guardian of every other right (4 Elliot's Debates, *supra* at 553-554) is dramatically demonstrated in this case where the fundamental of informed self-government is threatened by the vicissitudes of a relevancy standard that curbs free speech.

The possibility that a jury will protect critical and caustic speech is no substitute for the absolute protection of the Constitution and has, moreover, been disproven by history. The use of juries in sedition trials under the Fox Libel Act of 1792 in England, the Sedition Act of 1789 and the Espionage Act of 1917 in this country did not reduce the conviction rate. Levy, Legacy of Suppression 131-132 (1961); Chafee, Free Speech in the United States 70-71 (Rev. ed. 1954). As one student of free speech pointedly noted (Levy, *supra* at 254): "English sedition trials, like the American ones a few years later, proved conclusively that making juries judges of the criminality of allegedly seditious words did not have the effect of broadening the scope of free discussion, certainly not during times of stress—and there are rarely sedition trials at any other times."

To subject the availability of First Amendment guarantees to a perilous fact-finding process would deny the great accomplishment of the Constitution. As Justice Jackson declared in a case sensitive to national allegiances at a time when this country was

engaged in a war of survival (*West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943)):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote, they depend upon the outcome of no election.

The question whether criticism of a candidate's character is a matter of public interest cannot be obscured or made unreviewable by labeling it a question of fact for the jury. This Court, particularly in First Amendment cases as well as other areas of constitutional law, has stated that it would finally decide the issues upon which constitutional freedoms hinge.

Thus, in the *Times* case, the court defined its function as follows (376 U.S., at 285):

> This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." *Speiser* v. *Randall*, 357 U.S. 513, 525. In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth

> Amendment, protect." *Pennekamp* v. *Florida*, 328 U.S. 331, 335; see also *One, Inc.* v. *Olesen*, 355 U.S. 372. We must "make an independent examination of the whole record," *Edwards* v. *South Carolina*, 372 U.S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

See Garrison v. *Louisiana, supra; St. Amant* v. *Thompson, supra.* This court has similarly addressed itself to the meanings of obscenity (*Jacobellis* v. *Ohio*, 378 U.S. 184, 187-188 (1964)) and "clear and present danger" (*Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946); *see Feiner* v. *New York*, 340 U.S. 315 (1951)), because these concepts necessarily implicate an issue of constitutional law.[13] In rejecting state definitions of "public officials" for purposes of the *Times* principles, the Court in *Rosenblatt* ruled (383 U.S., at 84):

> Our decision in *New York Times* . . . draws its force from the constitutional protections afforded free expression. The standards that set the scope of its principles cannot therefore be such that 'the constitutional limits of free expression in the Nation would vary with state lines'. (Citations omitted.)

The rule which we propose—that defamation of a candidate for public office is always a matter of public interest and protected by the malice standard of the *Times* case—avoids the necessity for this Court or any other, to delve into the record to speculate whether

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[13] A wide range of other constitutional issues have been scrutinized under the same approach by this Court. *E.g., Haynes* v. *Washington*, 373 U.S. 503, 515 (1963) (voluntariness of confession); *Napue* v. *Illinois*, 360 U.S. 264, 272 (1959) (conviction secured with false evidence); *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 659 (1945) (state import tax); *Norris* v. *Alabama*, 294 U.S. 587, 589-590 (1935) (racial exclusion in selection of grand jury).

particular criticism is germane to a candidate's fitness. Indefinable problems of remoteness and citizen reaction are put aside. The continued vitality of democratic government demands that the electorate, not one or a handful of individuals, judge whether a defamatory statement reflects upon a candidate's qualifications for office.[14]

While equating the respondent to a public official, the trial court nevertheless instructed the jury that (A. 370) "[i]f [the disputed statement] would not touch upon or be relevant to his fitness for the office for which he was a candidate but was rather a bringing forward of the plaintiff's long forgotten misconduct in which the public had no interest", then the case would be adjudged by criteria akin to the common law fair comment rule.[15]

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[14] There is no impediment to our position from this Court's remark in *Rosenblatt* (383 U.S., at 88) that "as is the case with questions of privilege generally, it is for the trial judge in the first instance [and presumably thereafter the jury] to determine whether the proofs show respondent to be a 'public official' ". First of all, this follows common law tradition, which the Court specifically cited, 383 U.S., at 88, n.15. *See* 1 Harper and James, Torts § 5.29 (1956); Prosser, Torts §110 p. 823 (3d ed. 1964); Restatement, Torts § 619 (1932). In contrast, the common law rule applicable here vests the trial judge with exclusive authority to determine whether a defamation is a matter of public concern and consequently privileged. Restatement, Torts § 618(1); Prosser, Torts, § 110, p. 823 (3d ed. 1964). More important, the rubric of "public official" has been chosen as a constitutional principle, and is capable of acquiring precision to guide a jury. A concept of relevancy, on the other hand, has never been validated to delimit free speech, and for the reasons we have stated, it has no place where defamatory statements about a candidate's fitness for office are concerned.

[15] *See generally*, Restatement, Torts §§ 606, 607 (1932); Noel, *Defamation of Public Officers and Candidates*, 49 *Colum. L. Rev.* 875 (1949).

The New Hampshire Supreme Court's affirmance and apparently the trial court's disputed instruction, are bottomed on the following comments in *Garrison* (379 U.S., at 72):

> We need not be concerned whether this limitation [16] serves a legitimate state interest to the extent that it reflects abhorrence that "a man's forgotten misconduct, or the misconduct of a relation, *in which the public had no interest,* should be wantonly raked up, and published to the world, on the ground of its being true." 69 Hansard, Parliamentary Debates 1230 (3rd series) (H. L. June 1, 1843) (Report of Lord Campbell) (emphasis supplied by the Court).[8]

[8] We recognize that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned; therefore, nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discrete area of purely private libels. (Footnote of the Court.)

In *Garrison,* the defendant was prosecuted under a state criminal libel for accusing state judges of indolence, of taking excessive vacations, and of being under the influence of racketeers. The above-quoted portion of this Court's opinion was in response to an argument that, in order to protect reputation, truth alone should not be an absolute defense, but only truth spoken "with good motives and for justifiable ends". The argument was of no avail, for this Court held (379 U.S., at 72-73) "where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth". The Court moved on to hold, consistent with

[16] The limitation adverted to, and which was invalidated, was a requirement under Louisiana law that the truth be spoken with "good motives and justifiable ends".

New York Times, that even false statements made in this context are protected absent actual malice.

An examination of the entire *Garrison* opinion confirms that the portion relied upon by the New Hampshire courts below has no adverse impact upon the position we advance here. In *Garrison* the state court erroneously ruled, as the jury did here, that the criticism was a "private libel", since it attacked the personal integrity of the judges. Reversing in language ignored by the New Hampshire courts here, this Court stated (379 U.S. at 77):

> Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, *anything which might touch on an official's fitness for office is relevant.* Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character. As the Kansas Supreme Court said in *Coleman* v. *MacLennan,* speaking of candidates:
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> "Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office, and the liberal rule requires no more. But in measuring the extent of a candidate's profert of character it should always be remembered that the people have good authority for believing that grapes do not grow on thorns nor figs on thistles." 78 Kan. 711, 739, 98 P. 281, 291 (1908). (Emphasis supplied.)

This proposition supports rather than precludes the position developed here; the prior references in *Garrison* to private libel merely deferred the isolated question of whether the Constitution requires truth to be an absolute defense *even* in the "discrete" area of libels "totally unrelated to public affairs".

III. Prior Illicit Conduct of a Candidate Is Relevant to His Fitness for Public Office

Assuming *arguendo,* that certain defamations may conceivably be unrelated to a candidate's fitness for office, we contend nonetheless that the alleged defamation here was germane to Roy's fitness for a seat in the United States Senate.

A relevancy test would, as we have already argued, be a wholly inadequate safeguard for the First Amendment. But, even if relevancy were the test, this Court would be obliged to examine the evidence to ensure that freedom of speech was not improperly abrogated. *New York Times* v. *Sullivan, supra* at 284-285; *Jacobellis* v. *Ohio, supra* at 187-188.

The Court, we submit, would necessarily conclude from such an examination that prior crimes of a candidate committed while he was an adult, even if 26 to 37 years ago (A. 415), bear upon his present fitness for election to high office. The illicit trade in liquor, which has been characterized as a crime of moral turpitude (*Costello* v. *United States,* 365 U.S. 265, 269-271 (1961)), has been and is popularly associated with organized crime. *See* Allen, Only Yesterday 204-224 (1931). The fact that the illegality occurred during the bygone era of Prohibition does not foreclose the possibility that a segment of the public would infer that the candidate retains unsavory associations or lacks moral fibre. It is, in brief, a matter that should

be aired, for the public's abiding concern with the background of those vying for leadership deserves answers.

The Supreme Court of New Hampshire intimated that such prior conduct would be relevant but for its remoteness here. (A. 415.) That, to be sure, is an elusive basis upon which to refuse the electorate the information necessary "to cope with the exigencies of their period". *Time, Inc.* v. *Hill, supra* at 388. The electoral process would be radically eviscerated if publishers were silenced for fear their comments will later be adjudged "too remote". And, if 26 years is remote, what about 15 years or 5 years? Such a theory, if sustained, would spawn a hodgepodge of unworkable censorship varying from jury to jury, state to state.

A man who thrusts himself into the political area can make no legitimate bid that the secrets of his life should be shielded from the public. If he is a former criminal, the Constitution permits and indeed expects his opponent fearlessly to proclaim the fact, even though actuated by ill-will or hate. State laws which attempt to create an enclave of private reputation for a public candidate or public official contravene the Constitution at least to the extent such laws suppress statements about the candidate's prior criminal conduct.

IV. There Is No Evidence That Either Respondent Published With Actual Malice

Should this Court uphold petitioner's position, no retrial of the case would be necessary, for the record demonstrates that neither petitioner acted with actual malice, i.e., with knowledge of falsity or reckless disregard of the truth.

Where the malice standard is invoked, the plaintiff has the burden of showing with "convincing clarity" (*New York Times Co.* v. *Sullivan*, 376 U.S., at 285-286) that a false publication was made with actual knowledge of its falsity or with a "high degree of awareness of . . . probable falsity." (*Garrison* v. *Louisiana*, 379 U.S., at 74.) In the lineage of decisions by this Court originating with the *Times* case, and especially in the recent holding in *St. Amant* v. *Thompson, supra*, a variety of reportorial practices have been screened for indicia of the presence or absence of malice. It can readily be seen that under these criteria, this record is devoid of any evidence that "could constitutionally support a judgment for respondent" (*New York Times Co.* v. *Sullivan*, 376 U.S., at 284-285).

The trial court found, as to petitioner NANA, that there was no malice.[17] NANA's posture is precisely that of the individual subscribers to the advertisement in *Times*, who were summarily vindicated as follows (376 U.S., at 286):

> The case of the individual petitioner requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.

As for petitioner Monitor, there was no suggestion that it knew the statement was false. Nor was there any evidence of a reckless disregard of the truth. Monitor published in reliance not only upon Pearson,

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[17] See note 3, *supra*.

(A. 296-297) whom the paper regarded from experience as reliable (A. 16, 31), but also upon its own reviewing editor, who, because of his personal knowledge of the bootlegger accounts associated with Roy, considered it unnecessary to verify the column (A. 295-306). Such verification attempts would, in any event, not be essential to dispel malice. *New York Times* v. *Sullivan, supra; St. Amant* v. *Thompson, supra.* Moreover, at the trial credible evidence was elicited showing the truthfulness of Roy's bootlegging. See Statement of the Case, *supra.*

These facts hardly measure up to the rigorous standards set by this Court to establish a reckless disregard. In *Times,* the paper's failure to review its own files which would have disclosed errors in the publication was held insufficient to evince a reckless disregard (376 U.S., at 287-288). In *St. Amant,* the lower courts found that the publisher had no personal knowledge of the defamed individual's activities but relied solely on an affidavit from a third party whose veracity was unknown, without attempting to verify the information with individuals who may have known the facts, and that the publisher made the statement heedless of its defamatory consequences. Holding that even the totality of these circumstances did not amount to a reckless disregard, this Court supplied the following explication of the controlling standard (390 U.S., at 730-731):

> These considerations fall short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson. "Reckless disregard", it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for

judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra,* the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison* v. *Louisiana,* 379 U.S. 64 (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a "high degree of awareness of . . . probable falsity". 379 U.S., at 74. Mr. Justice Harlan's opinion in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 153 (1967), stated that evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

The constitutional policy which impelled this stringent precondition to recovery was restated (390 U.S., at 731-732):

> It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless

> disregard standard may permit recovery in fewer situations that would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not.

Finally, the opinion notes instances where a reckless disregard may be probable (390 U.S., at 732):

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of a fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Juxtaposed to the facts here, *St. Amant* effectively scuttles any claim that Monitor acted with reckless disregard.[18]

Predictably, respondent will attempt to resuscitate his case with the assertion that Pearson published with actual malice and that this malice should be "imputed" to the respondents.[19] In the first place, such a rule would impose upon a newspaper the crippling task of verifying the accuracy of its myriad news sources. Thus, every wire story, every syndicated column, every letter to the editor published without verification would, under respondent's view, expose the newspaper to a libel judgment if its source harbored malice. The publisher of the small daily involved here pointed out the practical problems (A. 15):

> Q. Did you have at your newspaper, Mr. Langley, any facilities to check whether what Mr. Pearson was saying in those regards was true or false?
>
> A. We have no means. We have to buy columns, the Associated Press news, and so on, and we have to take them on faith. We do not have the facilities or the means or the time to go back and recheck everything which is delivered to us, even by our own town correspondents.

The inescapable consequence of an "imputed malice" theory would be a ubiquitous self-censorship.

Another, and insuperable obstacle, to imputation of malice here is that Pearson himself is not shown to

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[18] As previously mentioned, the jury did not reach the malice issue because of its obvious finding that this case was a private libel. In any event, the trial court's definition of reckless disregard (A. 377) was plainly improper. *See Henry* v. *Collins, supra; Beckley Newspapers* v. *Hanks, supra.*

[19] See Respondent's Brief in Opposition to Petition for Certiorari, pp. 21-32.

have been reckless. He obtained the bootlegger information from Scott, who had been immersed in New Hampshire politics for many years (A. 83, 88-89, 125, 154, 162), and corroborated it through Millimet (A. 162-163). The Fifth Circuit, recognizing the realities of the press, captures the spirit of the *Times* doctrine in an analogous setting (*New York Times Co.* v. *Conner*, 365 F.2d 567, 576 (5th Cir. 1966)):

> While verification of the facts remains an important reporting standard, a reporter, without a "high degree of awareness of their probable falsity", may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official.

The fact that Pearson did not confront Roy with the information on his bootlegging activities is of no moment, for as Pearson testified (A. 171):

> From long experiences I've found that when you talk to a man, he usually, if he's in an embarrassing position, he usually denies it.

Nor can malice be constructed upon an assumption of a reputation for inaccuracy on the part of Pearson, for the record shows Monitor knew Pearson's journalistic reputation to be good. Moreover, the District of Columbia Circuit, affirming the summary dismissal of another libel suit against Pearson, spurned a malice claim premised upon evidence of prior mistakes by Pearson (*Washington Post Co.* v. *Keogh*, 365 F.2d, 965, 971-972 (D.C. Cir. 1966), cert. denied 385 U.S. 1011 (1967)):

> [G]iven its broadest possible significance, Keogh's affidavit shows only that Pearson had made

erroneous statements on a very few prior occasions, and that he has a controversial reputation.

The significance of this evidence must be judged in light of the relevant standard of law. As the Court indicated in *Times,* evidence offered in a libel case might be sufficient to raise a jury question as to a publisher's negligence but insufficient to raise one as to his actual malice. Proof of isolated instances of inaccuracy, therefore, in a 35-year career during which Pearson has published well over 10,000 columns, cannot be accorded significance, since the relevant rule of law contemplates that "erroneous statement is inevitable in free debate, and * * * it must be protected if the freedoms of expression are to have the breathing space they need to survive."

Finally, it should also be emphasized that the gravity of a defamation is not an index of malice. *Washington Post Co.* v. *Keogh, supra* at 969-970. The only relevance that factor has to this case is that it furnishes all the more reason for ensuring that the electorate is not deprived of this information.[20] *See* Part II of the Argument, *supra.* In sum, Pearson, who considered Scott "very convincing on this point" (A. 162), had no reason to question the report.

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[20] It would also be chimerical to assume recklessness from the fact that Pearson acquired the information from Roy's opposition, for in a political campaign, derogatory information about a candidate does not come from his own faction.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of New Hampshire should be reversed and remanded to enter judgment for the petitioners.

Respectfully submitted,

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